

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 11, 2008 Session

JOHN DOE v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Davidson County
No. 08C-359 Hon. Amanda McClendon, Judge

No. M2008-00807-COA-R3-CV - Filed March 10, 2009

In this action, plaintiff facially challenged the constitutionality of Tenn. Code Ann. § 40-39-202 *et seq.*, the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 as amended by Public Law 2007-465. The Trial Court upheld the constitutionality of the statute, and plaintiff appealed. On appeal, we affirm the Judgment of the Trial Court and remand.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and THOMAS R. FRIERSON, II., SP. J., joined.

Mark C. Scruggs, Nashville, Tennessee, for Appellant, John Doe.

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, and Benjamin A. Whitehouse, Assistant Attorney General, Nashville, Tennessee, for Appellee, State of Tennessee.

OPINION

In this declaratory judgment action, the appellant challenged the constitutionality of Tenn. Code Ann. § 40-39-202 *et seq.*, the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 as amended by Public Law 2007-465 (hereinafter Tennessee Sexual Offender Act).

The appellant, who was allowed by the Trial Court to use a pseudonym in place of his actual name, stated that plaintiff was convicted of aggravated sexual battery in 1983. He was paroled from prison in 1987 and he completed his parole in 1993. The statute as amended in 2007, precluded offenders from seeking to have their names removed from the Registry. Further, that he had petitioned to have his name removed from the Sex Offender Registry, but his request was denied by the Tennessee Bureau of Investigation (TBI) on October 29, 2007. He alleges the Act, as amended, is unconstitutional on the following grounds:

- a. The statute as amended by 2007 Pub. Acts, c. 465 violates plaintiff's rights to substantive due process under both the Fourteenth Amendment to the United States Constitution and Article 1, § 8 and Article 11, §8 of the Tennessee Constitution as there is no rational basis that a "law abiding citizen" for almost twenty years should now be required to register as a sex offender and have his name "plastered on the internet". .
- b. Plaintiff also contended that the statute as amended by 2007 Pub. Acts. c. 465 violated his right to procedural due process as the statute prohibits him from petitioning the TBI for removal from the SOR because of the nature of his conviction. Accordingly, plaintiff claimed that the statute as amended precluded him from challenging the very procedures imposed by the statute.
- c. Lastly, plaintiff challenged the statute as amended because it restricted his fundamental constitutional right to travel as established by the United States Constitution. In support of this contention, plaintiff cited *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 89 S. Ct. 1322, 1328-1329, 22 L. Ed.2d 600 (1969).¹

The State filed a notice of setting a motion to dismiss on a date to be heard, but the actual motion is not part of the technical record. There is no transcript of a hearing or transcript of any oral reasons for the judgment the trial court may have provided to the parties.

Prior to the time 2007 Pub. Acts, c. 465 took effect, persons convicted of a sex offense before 1994 were not required to comply with the sex offender registration scheme. Once the amendment to the statute became effective, plaintiff complied with its registration requirement and he has not been cited for any violation of that statute.

The Trial Court based its dismissal of plaintiff's claims on the following conclusions of law: The Court found that there is a compelling State interest in regulating the conduct of

¹ While *Shapiro* does address the constitutional right to travel between the states, it was overruled by on other grounds *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S. Ct. 1347, 1360 (U. S. Ill. 1974).

persons convicted of sexual offenses and offenses against minors even after the expiration of their criminal sentence. The Court based this legal conclusion on the federal case of *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). The Court stated that both the registration requirement and the restrictions placed on where plaintiff can work and live were “sufficiently narrowly tailored” when compared to the interest of the public. The Court held that 2007 Pub. Acts, c. 465 is a reasonable, regulatory scheme that does not infringe on plaintiff’s due process rights under the United States Constitution and the Tennessee Constitution. Although 2007 Pub. Acts, c. 465 made the registration, living and working conditions applicable to plaintiff even though the amendment to the statute was enacted after plaintiff’s sentence was completed, there is a compelling State interest accomplished by the amendment that is sufficiently narrowly tailored so as to not unreasonably burden the plaintiff’s rights. The Court cited to *State v. Gibson*, No. 42003-02102-CCA-R3-CD, 2004 WL 2827000 (Tenn. Ct. Crim. App. Dec. 9, 2004)(former Tenn. Code Ann. §40-39-108 (repealed 2004) did not violate either federal or state constitutional prohibitions against ex post facto laws)². Accordingly, the State’s motion to dismiss was granted and plaintiff’s case was dismissed with prejudice. Plaintiff has appealed.

On appeal, both parties agreed that there were no disputed issues of material fact before the court. Accordingly, this appeal involves only questions of law. The standard of review is *de novo* without any presumption of correctness given to the legal conclusions of the Trial Court. *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn.2005).

Tennessee courts when considering the constitutionality of a statute begin with a strong presumption that acts passed by the legislature are constitutional. *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006)(citing *Osborn v. Marr*, 127 S.W.3d 737, 740-41 (Tenn. 2004)). This Court “must indulge every presumption and resolve every doubt in favor of constitutionality.” *Lynch* at 390. A facial challenge to a statute, such as that involved here, is “the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid.” *Lynch* at 390.

The *Cutshall* case provides the background of sexual offender registration laws enacted by all of the states under the direction of the federal government. In 1994 Congress enacted, and the President signed into law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071. Under this legislation, the Attorney General of the United States was required to establish guidelines for state programs requiring persons convicted of crimes against minors or crimes of sexual violence to register a current address with state law enforcement officials. 42 U.S.C. § 14071(a)(1)(A). The statute provided that the states were given three years from September 1, 1994 within which to comply with the statute and enact a sexual offender registration scheme. Failure to implement a registration program would result in the loss of federal funding.

²Tenn. Code Ann. §40-39-101 *et seq.* (repealed 2004) was replaced by Tenn. Code Ann. §40-39-201 *et seq.*

In 1994, the Tennessee legislature adopted its own Sexual Offender Registration and Monitoring Act., Tenn. Code § 40-39-101 to 108 (repealed 2004). The 1994 law did not apply to anyone convicted of a sexual offense prior to January 1, 1995 who had been discharged from incarceration or supervision prior to that date. *State v. Gibson*, No. E2003-02102-CCA-R3-CD, 2004 WL 2827000 (Tenn. Ct. App. Dec. 9, 2004). The 1994 Act did not apply to appellant. This Act was repealed and was replaced by the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004. While that Act did not apply to plaintiff, Tenn. Code Ann. § 40-39-202 was amended in 2007 by 2007 Pub. Acts 465 and a “violent sexual offender” was redefined to mean “ a person who has been convicted in this state of committing a “violent sexual offense”.³ By removing the date restrictions, the legislature effectively reclassified appellant to be a “ violent sexual offender”.

The General Assembly provided the basis for enacting the Sexual Offenders Registration Act of 2004 at Tenn. Code Ann. § 40-39-201 (b) and made it clear that the purpose of the Act is to protect the public from the danger and propensity for recidivism of convicted sexual offenders and not as a mode of punishment. The legislature set out the intended purpose of the Act as follows:

- (1) Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are violent sexual offenders who present an extreme threat to the public safety. Sexual offenders pose a high risk of engaging in further offenses after release from incarceration or commitment, and protection of the public from these offenders is of paramount public interest;
- (2) It is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses collected pursuant to this part, to allow members of the public to adequately protect themselves and their children from these persons;
- (3) Persons convicted of these sexual offenses have a reduced expectation of privacy because of the public's interest in public safety;
- (4) In balancing the sexual offender's and violent sexual offender's due process and other rights against the interests of public security, the general assembly finds that releasing information about offenders under the circumstances specified in this part will further the primary governmental interest of protecting vulnerable populations from potential harm;
- (5) The registration of offenders, utilizing complete and accurate information, along with the public release of specified information concerning offenders, will further the

³ Violent sexual offense is defined at Tenn. Code Ann. § 40-39-202 (28) and plaintiff's conviction falls within this category.

governmental interests of public safety and public scrutiny of the criminal and mental health systems that deal with these offenders;

(6) To protect the safety and general welfare of the people of this state, it is necessary to provide for continued registration of offenders and for the public release of specified information regarding offenders. This policy of authorizing the release of necessary and relevant information about offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive;

(7) The offender is subject to specified terms and conditions that are implemented at sentencing, or, at the time of release from incarceration, that require that those who are financially able must pay specified administrative costs to the appropriate registering agency, which shall retain one hundred dollars (\$100) of these costs for the administration of this part and shall be reserved for the purposes authorized by this part at the end of each fiscal year, with the remaining fifty dollars (\$50.00) of fees to be remitted to the Tennessee bureau of investigation's sex offender registry; and

(8) The general assembly also declares, however, that in making information about certain offenders available to the public, the general assembly does not intend that the information be used to inflict retribution or additional punishment on those offenders.

Tenn. Code Ann. § 40-39-201 (b).

Appellant acknowledges that the Sixth Circuit has held that the repealed Tennessee Act did not violate the federal constitutional provisions against double jeopardy, ex post facto laws, bill of attainder, due process and equal protection. *See Cutshall*. However, appellant seeks to challenge the 2004 Act as amended by 2007 Pub. Acts based upon the procedural and substantive due process and equal protection provisions found in Article 1, §8 and Article 11, § 8 of the Tennessee Constitution. There is nothing in the record to indicate that appellant raised the issue of equal protection in the Court below and it cannot be considered as an issue on appeal. *Simpson v. Frontier Cmty. Credit Union*, 810 S.W.2d 147, 151 (Tenn.1991).

Art. 1, § 8 of the Tennessee Constitution provides “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.” Art. 11, § 8 provides that “[t]he Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or

diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and no such alteration or repeal shall interfere with or divest rights which have become vested.”

The Tennessee Supreme Court, in *Seals v. State* 23 S.W.3d 272 (Tenn. 2000), noted that the language of the “due process” provisions in the United States Constitution differs from the “law of the land” provision found in the Tennessee Constitution. The United States Supreme Court’s interpretations of the United States Constitution established a minimum level of protection while the Tennessee Supreme Court, as final arbiter of the Tennessee Constitution, is free to extend greater protection to its citizens. *Id.* (citing *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn.1988)). Nonetheless, our State Supreme Court has stated in previous decisions that Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution and the Fourteenth Amendment to the Constitution of the United States confer essentially the same protection upon the individuals subject to those provisions. *Tennessee Small School Systems v. McWherter* 851 S.W.2d 139, 152 (Tenn.1993).

Due process under the state and federal constitutions encompasses both procedural and substantive protections. The most basic principle underpinning procedural due process is that individuals be given an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. *Lynch* at 391.

In contrast, substantive due process limits oppressive government action, such as deprivations of fundamental rights like the right to marry, have children, make child rearing decisions, determine child custody, and maintain bodily integrity. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed.2d 772 (1997). Substantive due process claims generally may be divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions by the government which are “arbitrary or conscience shocking in a constitutional sense.” *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S. Ct. 1061, 117 L. Ed.2d 261 (1992). Unless a fundamental right is involved, the test for determining whether a statute comports with substantive due process is whether the legislation bears “a reasonable relation to a proper legislative purpose” and is “neither arbitrary nor discriminatory”. *National Gas Distributors v. Sevier County Utility Dist.*, 7 S.W.3d 41, 45 (Tenn. Ct. App. 1999). Substantive due process bars certain government action regardless of the fairness of the procedures used to implement them. *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 140 L. Ed.2d 1043 (1998).

In this case, appellant made no allegation that a fundamental right had been violated, nor did the Trial Court in its Final Judgment make a reference that a fundamental right had been called into question. The Complaint shows that plaintiff assumed that the rational basis standard should be applied by the Court. Accordingly, the test for determining whether the Tennessee Sexual Offender Act as amended by 2007 Pub. Act 465 comports with substantive due process is whether the statute bears a reasonable relation to a proper legislative purpose and is neither arbitrary nor invidiously discriminatory. *Newton*, 878 S.W.2d at 110. In applying this test, courts do not inquire into the motives of a legislative body or to scrutinize the wisdom of a challenged statute or

ordinance. *Martin v. Beer Bd. for City of Dickson* 908 S.W.2d 941, 955 (Tenn. App.,1995).

The General Assembly specifically stated that it enacted this Act to protect the public from dangers that are posed by convicted sex offenders. The 2007 amendment merely extended this intended purpose to include all violent sex offenders, irregardless of the date of their conviction.

The Trial Court found that “[t]here is a compelling State interest in regulating the conduct of persons convicted of sexual offenses and offenses against minors even after the expiration of the criminal sentence.” Such regulatory schemes have been upheld by other courts as reasonable regulatory measures that serve the purpose of protecting the public. *Smith v. Doe*, 538 U.S. 84, 104, 123 S. Ct. 1140, 1153 (U.S. 2003); *Cutshall*.

We conclude the Trial Court did not err when he found that the Act had a reasonable relation to the stated purpose of legislation, to protect the public from the danger associated with sexual offenders, and it was not error for the Trial Court to decline to expand the due process protection under Federal law in this instance. Moreover, there was no showing by appellant that the Act was either arbitrary or discriminatory as he did not demonstrate that he had been treated differently than other violent sexual offenders. *Gallagher v. Elan*, 104 S. W. 3d 455, 463 (Tenn. 2003).

Next, appellant claims that his procedural due process rights were violated by the 2007 amendment because he, as a convicted violent sexual offender, must continue to comply with the registration requirements for the rest of his life and because he is not afforded the right to request that the TBI remove his name from the registry.

Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 - 2, , 123 S. Ct. 1162 (U.S. 2003), upheld Connecticut’s sex offender registry statute against a similar challenge. The state rejected the plaintiff’s argument in that case, based on the following reasoning:

In cases such as *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed.2d 515 (1971), and *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed.2d 725 (1975), we held that due process required the government to accord the plaintiff a hearing to prove or disprove a particular fact or set of facts. But in each of these cases, the fact in question was concededly relevant to the inquiry at hand. Here, however, the fact that respondent seeks to prove—that he is not currently dangerous is of no consequence under Connecticut's Megan's Law. . . . [T]he law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. . . . No other fact is relevant to the disclosure of registrants' information

. . . [E]ven if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that

substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. It may be that respondent's claim is actually a substantive challenge to Connecticut's statute "recast in 'procedural due process' terms." *Reno v. Flores*, 507 U.S. 292, 308, 113 S. Ct. 1439, 123 L. Ed.2d 1 (1993). Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections . . . and maintains, as he did below, that his challenge is strictly a procedural one. But States are not barred by principles of "*procedural* due process" from drawing such classifications. *Michael H. v. Gerald D.*, 491 U.S. 110, 120, 109 S. Ct. 2333, 105 L. Ed.2d 91 (1989) (plurality opinion) (emphasis in original). See also *id.*, at 132, 109 S. Ct. 2333 (STEVENS, J., concurring in judgment). Such claims "must ultimately be analyzed" in terms of substantive, not procedural, due process. *Id.*, at 121, 109 S. Ct. 2333. Because the question is not properly before us, we express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process.

Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme. Respondent cannot make that showing here.

Connecticut Dept. of Public Safety, 538 U.S. at 7-8, 123 S. Ct. at 1164 - 1165.

Based on the reasoning in *Connecticut Dept. of Public Safety*, appellant's procedural due process argument fails and the Trial Court's finding that his right to due process was not violated is not error.

Finally, appellant argues that the Act violates his fundamental right to travel. This argument is also without merit. Both the United States Supreme Court and the Tennessee Supreme Court have recognized the right to travel freely among the states as a fundamental, constitutionally protected right. *Daniels v. Daniels*, No. 89-333-11, 1990 WL 17211 at * 3 (Tenn. App. Feb. 28, 1990); *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322, 1329(1969)(overruled on other grounds by *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (U.S. Ill. 1974); *Knowlton v. Board of Law Examiners*, 513 S.W.2d 788, 790-91 (Tenn.1974)).

The right to travel embraces at least three different components: (1) it protects the right of a citizen of one state to enter and to leave another state; (2) it protects the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and (3) for those travelers who elect to become permanent residents, it protects the right to be treated like other citizens of that state. *Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 1525, 143 L. Ed. 2d 689 (1999). In *Cutshall*, The Sixth Circuit under the former sexual offender statute, held the statute did not violate the fundamental right to interstate travel. The Court reasoned that the Act applied to all sex offenders residing in Tennessee regardless of where they were convicted, and the Act contained no duration of residency restriction and that all fifty states have adopted sex offender

registries. Accordingly, Tennessee was no more or less attractive than any other state for sex offenders seeking a place to reside in total anonymity. The reasoning is applicable to the current Sexual Offender Act as amended in 2007. Moreover, appellant did not allege a set of facts that would demonstrate how the Sexual Offender Act has impeded his right to travel among the states, thus, his argument on this issue also fails.

We affirm the Judgment of the Trial Court that the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004, as amended by 2007 Pub. Law 465, does not violate appellant's right to due process or his right to interstate travel.

The Judgment of the Trial Court is affirmed and the cause remanded, with the cost of the appeal assessed to appellant, John Doe.

HERSCHEL PICKENS FRANKS, P.J.